



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1219 OF 2014**

**KENNEDY NYACHIRO .....CLAIMANT**

**VERSUS**

**SEVENTH DAY ADVENTIST CHURCH**

**REGISTERED TRUSTEES.....RESPONDENT**

**RULING**

The Claim herein was filed by the claimant Kennedy Nyachiro against the Respondent the Seventh Day Adventist Church Registered Trustees seeking a permanent injunction to restrain the Respondent from suspending him from his employment or otherwise terminating his employment or interfering with the Claimant's residence and property. The claim which was filed on 21<sup>st</sup> July, 2014 through a Memorandum of Claim was filed together with a Notice of Motion under certificate of urgency seeking the following orders;

1. That the Respondent be restrained by himself/servants and/or agents from interfering in any manner whatsoever with the Claimant's employment, residence and Motor Vehicle Registration No. KBT 996P until the hearing of this suit and/or further orders of this Honourable. Court.
2. That pending the hearing of this application the Respondent be and is hereby restrained by himself/servants and/or agents from suspending the Claimant from duty, interfering with his residence and Motor Vehicle Registration No. KBT.996P.
3. That the costs of this application be provided for.

The Notice of Motion was heard ex-parte on 22<sup>nd</sup> July, 2014 by Justice Mbaru who certified the application urgent and ordered that the Respondent allows the claimant to retain the house at his residential premises with the Respondent and the motor vehicle Reg. No. KBT 996P pending the inter partes hearing of the application. She fixed the application for hearing on 29<sup>th</sup> July, 2014.

On 28<sup>th</sup> July, 2014 the Respondent filed an application seeking the discharge or setting aside of the orders granted ex-parte on 22<sup>nd</sup> July, 2014 by Justice Mbaru.

Justice Marete considered the application on 28<sup>th</sup> July, 2014, certified it urgent and ordered that it be served upon the Claimant. He fixed the application for hearing inter-partes on 4<sup>th</sup> August, 2014 by the duty Judge or any other judge of this court.

The claimant filed a replying affidavit on 1<sup>st</sup> August, 2014. Being the duty Judge on 4<sup>th</sup> August, 2014 the application came before me for inter partes hearing. The claimant was represented by Mr. Nyakundi

instructed by Nyakundi & Company Advocates while the Respondent /Applicant was represented by Mr. Kahonge instructed by Macharia Kahonge & Company Advocates.

The facts of the case are that the Claimant was employed by the Respondent on 8<sup>th</sup> August 2012 as a Security Officer at the Respondents regional Church headquarters in Ongata Rongai. On 12<sup>th</sup> June 2014 there was a robbery at the residence of a Mr. Jerome Habimana, one of the employees of the Respondent who was allegedly robbed of Shs. 3 million. The Claimant was subsequently arrested and charged in the Chief Magistrates Court at Kibera with offences related to the robbery in case No. 2956 of 2014 is still pending in court.

On 18<sup>th</sup> July 2014 the Respondent suspended the Claimant from duty. The grounds of suspension related to the robbery and other alleged cases of misconduct. The suspension letter states that the suspension is for an indefinite period. It required the Claimant to vacate the premises he occupies at Advent Hill Compound within two days of receipt of the suspension letter, surrender of motor vehicle registration No. KBT 996P or pay the balance of his loan to the cashier, surrender of property of the Organization under his charge to his immediate Supervisor immediately and to get a clearance from Mr. Maiyo who is the person in charge of security on behalf of the management.

It is this letter of suspension that prompted the Claimant to file this suit and the notice of motion whose orders are the subject of the Respondent's application.

Mr. Kahonge urged the court to set aside or vacate the orders granted to the Claimant on 22<sup>nd</sup> July 2014 on the grounds that the Claimant did not come to court with clean hands and that that the Claimant is guilty of suppression of facts. He submitted that the Claimant did not disclose to the court the fact that the premises he was occupying which the court ordered that he retains, belong to the Respondent. He further submitted that the Claimant

did not disclose to the court the fact that he was under suspension as he prayed in the application for orders restraining the Respondent from suspending him yet he is already on suspension. He submitted further that the Claimant attended the meeting at which the decision to suspend him was made. Mr. Kahonge also submitted that the Claimant did not disclose to the court the fact that motor vehicle registration No. KBT 996P which the court ordered to be released to him was purchased through a loan advanced to him by the Respondent and that he is liable to repay the loan and register the motor vehicle in the joint names of the Respondent and himself. Mr. Kahonge submitted that the Claimants contract does not entitle him to a house in the Respondents compound, that the reasons leading to his suspension border on Security, that the orders granted to the Claimant are underserved and oppressive to the Respondent and that the Respondent will suffer greater hardship by the continued existence of the orders.

Mr. Nyakundi for the Claimant opposed the application. He submitted that the court was alive to all the facts that the Responded alleges were suppressed, concealed or distorted by the Claimant. He submitted that the Claimant was entitled to housing by the Respondent by virtue of his employment, that the judge did not lift the suspension of the Claimant, that the Claimant did not participate in the meeting held on 18<sup>th</sup> July 2014 as he was not summoned to the meeting nor was he in attendance. He further submitted that the charges against the Claimant were trumped up and are pending in court. He submitted that the application is mischievous and should be dismissed with costs.

I have considered the application and the supporting affidavit sworn by Nehemiah Maiyo on 28<sup>th</sup> July 2014 as well as the replying affidavit sworn by the Claimant. I have also considered the oral submissions made in court by counsel for both the applicant/Respondent and the Claimant.

First I must express my disappointment at the decision of the Respondent to file this application on 28<sup>th</sup> July 2014 for vacation of orders granted to the Claimant on 22<sup>nd</sup> July 2014. The application was due for interpartes hearing on 29<sup>th</sup> July 2014 and the Respondent had an opportunity to raise all the issues raised in its application in its reply to the Claimant's application dated 21<sup>st</sup> July 2014. We would perhaps be delivering a ruling, on the Claimant's application which as of now is yet to be heard. At the same time

we would have saved on precious judicial time and costs to the parties of prosecuting this application without subjecting the Respondent to any additional prejudice.

As submitted by Mr. Kahonge interim orders may be set aside if they were obtained by fraud, misrepresentation or non-disclosure of material facts. The Applicant alleges the orders herein were obtained by suppression of the fact that the premises which were the subject of the order belong to the Respondent and the who is under suspension. I have perused the affidavit of the Claimant sworn on 21<sup>st</sup> July 2014 in support of his application of the same date paragraph 8 states that the Claimant has been suspended from duty and a copy of the letter of suspension is attached. The suspension letter at appendix KN4 explicitly states that the Claimant should vacate the premises he occupies at Advent Hill Compound within two days at item 1 of the concluding paragraph. At item two of the same paragraph the letter requires him to surrender the vehicle registration No. KBT 949P or pay the balance of his loan.

The two paragraphs which are in the bundle that were in the application before the court clearly disclose that the Claimant was living in the Claimants premises and that motor vehicle registration No. KBT 996P was the subject of a loan. The letter is also confirmation of the Claimant's suspension from duty.

From the foregoing I find that there was no suppression of the fact that the Claimant was under suspension, or that he was occupying a house within the Respondent's premises at Advert Hill or that the motor vehicle KBT 996P was the subject of a loan advanced to the Claimant by the Respondent.

Another issue raised by Counsel for the Applicant is that there are people of varied nationalities residing within the Advent Hill compound and the expatriates cannot live with a suspect in the same compound. The Applicant has however not demonstrated to this court that apart from the fact that the Claimant has been charged with an offence relating to a robbery that occurred within the compound, there is any evidence connecting the Claimant to the robbery. This issue is pending before the court for determination. The Claimant has alleged that the charges are trumped up. In any event there is a request to the police to provide security to the Advent Hill. This is attached as Appendix D to the affidavit of the Respondent's application.

For the foregoing reasons I find that there is no merit in the Respondent's application dated 28<sup>th</sup> July 2014 and dismiss it with costs.

Order accordingly.

Dated and delivered at Nairobi this 8<sup>th</sup> day of August 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Kimathi holding brief for Mr. Kahonge for Respondent/Applicant

Nyakundi for Respondent

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